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In The

Supreme Court of the United States

JEREMY GOLDBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, when determining the "reasonableness" of a district court's sentence under *United States v. Booker*, 543 U.S. 220 (2005), it is appropriate to require district courts to justify a deviation from the United States Sentencing Guidelines with a finding of extraordinary circumstances?

LIST OF PARTIES

Petitioner, Jeremy Goldberg, was the defendant in the District Court and the appellee in the Court of Appeals. Respondent, who was the plaintiff in the District Court and appellant in the Court of Appeals, is the United States. All parties to the proceeding are listed in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jeremy Goldberg respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on June 27, 2007.

OPINIONS BELOW

The opinion of the court of appeals reversing the district court's sentence is reported at 491 F.3d 668 and is reproduced in Appendix A to this Petition at Appx. 1-14. The sentencing judgment and Statement of Reasons of the district court is unreported and is reproduced in the Appendix to this Petition at Appx. 18-31. The amended sentencing judgment, entered to correct certain clerical errors, is unreported and is reproduced in the Appendix to this Petition at Appx. 15-17. The portion of the transcript of the sentencing hearing containing the district court's imposition of sentence is reproduced in the Appendix to this Petition at Appx. 32-51.

JURISDICTION

The judgment of the District Court, which had jurisdiction pursuant to 18 U.S.C. § 3231, was entered on January 8, 2007. An amended judgment was entered on January 26, 2007 to correct certain clerical errors. The judgment of the Court of Appeals, which had jurisdiction pursuant to 28 U.S.C. § 1291 and 18

U.S.C. § 3742 was entered on June 27, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3553(a) and (c), which govern "Imposition of a Sentence," are reproduced in the Appendix at Appx. 52-55.

18 U.S.C. § 3742(e), governing "Review of a Sentence," is reproduced in the Appendix at Appx. 55-56.

18 U.S.C. § 2252A(a)(5)(B), the statute of conviction, is reproduced in the Appendix at Appx. 57.

18 U.S.C. § 2252A(b)(2), which sets forth the allowable punishment for the crime of conviction, is reproduced in the Appendix at Appx. 57.

STATEMENT OF THE CASE

Petitioner Jeremy Goldberg, a twenty-year-old college student at the time of the events, was charged in a one count information with a violation of 18 U.S.C. § 2252A(a)(5)(B) for possessing certain images constituting child pornography on his personal computer. In short, Goldberg had set up his computer to allow others on the internet to "swap" pornographic images to and from his hard drive, and a number of

images of child pornography were downloaded to his computer.

On March 24, 2006, Petitioner pleaded guilty to the information. The Probation Office calculated Petitioner's Guideline range as 63-78 months. The statutory provision to which Petitioner pleaded guilty does not provide any mandatory minimum sentence that must be imposed. Appx. 57; *United States v. Goldberg*, 491 F.3d 668, 672 (7th Cir. 2007) (Appx. 9).

Several months prior to sentencing, Petitioner was tested and evaluated by Dr. George Goldman, Ph.D., a licensed Clinical Psychologist who specializes in evaluating and treating adult and juvenile sex offenders. Dr. Goldman issued a detailed report in which he concluded that Petitioner is not sexually interested in children and does not have an interest in sadistic sexual behavior. Dr. Goldman further testified by affidavit that:

> 4. Based on my education and experience, the results of the tests administered to Jeremy Goldberg, as well as my personal interviews and evaluation of Jeremy Goldberg, and in conjunction with the contents of my written report (attested to above), I also have the following conclusions and opinions, which I hold to a reasonable degree of certainty:
>
> a. Jeremy Goldberg's test scores and my evaluation make clear that Jeremy has no sexual interest in young children. Jeremy has normal sexual interests for a

young adult male, including being attracted to adolescent and post-pubescent females, which is normal for adult males according to the Abel test protocols.

b. Jeremy Goldberg is not a pedophile, and he is not a danger to children.

c. My evaluation as well as Jeremy Goldberg's test results indicate that he has genuine remorse for his offense.

d. Jeremy Goldberg has a very low probability of re-offending, and he is not a danger to the community.

e. I believe that Jeremy Goldberg would benefit greatly from continued therapy, and Jeremy is an excellent candidate for such treatment.

In response to Dr. Goldman's report, the government retained its own expert, Ms. Gabriele Cohen, a clinical social worker, to evaluate Petitioner. Ms. Cohen administered a battery of tests to Petitioner and came to the same conclusions as Dr. Goldman on the central points of interest. That is, Ms. Cohen found that Petitioner does not have a sexual interest in children; that he has not had any sexual contact with a child and is not a danger to have any such contact; and that he has shown remorse for his behavior. *See* Appx. 28-31 (district court's Statement of Reasons in support of sentence).

On December 20, 2006, the district court held a sentencing hearing, at which the defense offered

evidence regarding Petitioner's background and his expressed remorse for the conduct at issue. The defense alsc stressed to the district court the findings and conclusions from both Dr. Goldman and the government's expert, Ms. Cohen, both of whom confirmed Petitioner was not a pedophile, had never molested a child, and was not a threat to do so.

After hearing evidence and argument from the parties, the district court sentenced Petitioner to one day of imprisonment, time considered served, followed by 10 years of supervised release, along with a host of special conditions, most of which tracked the recommendations of the government's expert, Ms. Cohen. Appx. 23-24. Along with its Sentencing Order, the district court issued a Statement of Reasons in which it laid out its reasoning for the sentence imposed. In that Statement of Reasons, the district court wrote:

> Whether the guideline sentence is a reasonable sentence in this case (63-78 months) or whether a proper weighing of §3553 factors leads to a different and more reasonable sentence, depends upon whether the court adopts the Government's or the defense's narrative of what this case is about. The court adopts the defense narrative and concludes that the guideline sentence is unreasonable. At the same time, to minimize any risk of error, the court imposes an unusually long period of supervision (10 years) and adopts most of the conditions suggested by

the Government's expert as appropriate conditions of supervision.

Neither side in this case suggests that Mr. Goldberg represents any likelihood of actually harming children himself. Both sides' experts agree that their testing indicates that Mr. Goldberg has never molested children and is not likely ever to do so. . . .

The defense claims that Mr. Goldberg was an immature and judgmentally challenged young man . . . The defense argues that Mr. Goldberg is fundamentally decent, from a strong and supportive family, who is emerging from a history of academic and personal problems from ADD (including marijuana use) with a college degree on the near horizon. Importantly, the defense argues (with the backing of their psychiatrist) that Mr. Goldberg has normal sexual interests and is not a pedophile, internet or otherwise. The defense argues, and having seen and heard from Mr. Goldberg the court agrees, that Mr. Goldberg committed this crime without understanding the seriousness of his conduct or the way such conduct harms other people.

Along with consideration of the §3553 factors, the court has considered the risks of error should it adopt the wrong narrative. Given that no one argues that any actual children are at risk from any conduct of Mr. Goldberg (other than the harm to children who are used to make images used on the

internet), the court believes that potential harm to society from any recidivism by Mr. Goldberg can be substantially minimized by adopting most of the conditions of supervision suggested by the Government's expert: *see* page 4 of letter of Gabriella Cohen. Thus, given the kind of harm any recidivism by Mr. Goldberg is likely to cause based on the Government's narrative can be minimized and perhaps eliminated. At the same time, the court believes that the Government's suggestion that there should be "consequences" to Mr. Goldberg from his conduct can be satisfied by this felony conviction, an extremely lengthy period of supervision, a substantial requirement of community service, a fine, and the lifetime of sex offender registration that the law will require of Mr. Goldberg, with all the difficulties this kind of a conviction is likely to create for him.

On the other hand, the costs of error if the defense narrative is correct and the court sends Mr. Goldberg to prison are enormous. His education will be interrupted, his self-esteem will be irreparably injured and he will spend considerable time in his young life with persons whose deviance is far more significant and dangerous than his own. . . . If the defense narrative is correct, a sentence of imprisonment with the possibility of sex offender treatment, coupled with the unavoidable collateral consequences of this type of conviction, are likely to injure Mr. Goldberg in significant and irreparable ways.

> Having reviewed the psychiatric reports submitted by both parties, the court believes that the defense narrative is probably correct. Under §3553, that being the case, the nature and circumstances of the offense, and the history and characteristics of the defendant, suggest a long period of supervision with intense conditions of supervision and not imprisonment. A felony sex offense conviction, with a long period of supervision, a fine and community service, plus collateral consequences such as registration as a sex offender, is adequate to reflect the seriousness of the offense, promote respect for the law, impose just punishment, afford adequate deterrence, protect the public from further crimes of the defendant and provide the defendant with the supervision and treatment that he needs.

Appx. 28-31. (The pages of the sentencing transcript containing the district court's oral rulings are also included in the Appendix hereto at Appx. 32-51.)

On January 31, 2007, the district court entered an amended judgment, pursuant to Federal Rule of Criminal Procedure 36, to correct clerical errors in the judgment order. Appx. 15-17.

The government appealed the district court's sentence, claiming that the sentence was unreasonable because it deviated so significantly from the Guidelines-suggested sentence. The Court of Appeals for the Seventh Circuit reversed the district court's sentence, holding that the facts and circumstances

relied on by the district court were not sufficiently extraordinary to justify the below-Guidelines sentence imposed, and that the district court had incorrectly weighed the factors it considered in fashioning its sentence. Appx. 5-13; *Goldberg*, 491 F.3d 668, 671-73.

REASONS FOR GRANTING THE WRIT

In the opinion below, the Seventh Circuit held the district court's sentence, which was substantially below the advisory Sentencing Guidelines, to be unreasonable because it was not supported by sufficiently extraordinary or unusual circumstances. *Goldberg*, 491 F.3d at 671-73. Although the Seventh Circuit noted that the statute of conviction contains no mandatory minimum (and even allows for punishment by a fine alone), it nevertheless proceeded to find that the absence of a mandatory minimum in the statute does not mean Congress thought there might be cases in which no prison time would be warranted for a particular defendant. The appellate court wrote:

> It is true as the defendant points out that the statute under which [Petitioner] was convicted contains no mandatory minimum. But it does not follow that Congress envisaged no prison time for violators. The absence of a mandatory minimum sentence may signify no more than that the legislature did not want to take the time to try to determine what the minimum sentence

> should be or did not think it could anticipate unusual cases in which a light sentence might be appropriate.

Id. at 672. This reasoning is faulty.

Most notably, Congress *did*, in fact, take the time to determine what child pornography crimes warranted mandatory minimum sentences, and Petitioner's crime of conviction was not one of them. Thus, mandatory minimum sentences are specified for certain violations of 18 U.S.C. § 2252(a) and § 2252A, but not Petitioner's violation. See 18 U.S.C. § 2252(b)(1) (imposing five year mandatory minimum for certain violations under 18 U.S.C. § 2252); 18 U.S.C. § 2252A(b)(1) (imposing five year mandatory minimum for certain violations of 18 U.S.C. § 2252A). Petitioner was neither charged with nor convicted of an offense that carries a mandatory minimum. Rather, the statute of conviction (18 U.S.C. § 2252A(a)(5)(B)) plainly allows for a sentence of minimal or no imprisonment should the circumstances warrant. 18 U.S.C. § 2252A(b)(2) ("Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both . . . "); Appx. 57.

The district court, in light of all the facts and circumstances presented – which it set forth and reasonably weighed in its Statement of Reasons attached to the sentencing order (Appx. 27-31) – determined that a prison sentence of one day, time considered served, followed by ten years of supervised

release with a number of special conditions was a sentence that was "sufficient, but not greater than necessary" to satisfy the purposes set forth in § 3553(a)(2). The appellate court simply replaced the district court's discretionary weighing of the relevant factors with its own. That is not what this Court envisioned in *Booker*, 543 U.S. 220, when it made the Guidelines advisory, nor does it comport with the Court's long-held view of the discretion afforded to sentencing judges. See generally, *Koon v. United States,* 518 U.S. 81, 113 (1996) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.").

Similar to the instant case, the Eighth Circuit Court of Appeals in *United States v. Claiborne* held that the district court's downward departure from the Guidelines' recommendation was not supported by "extraordinary circumstances" and vacated the district court sentence as a result. 439 F.3d 479, 481 (8th Cir. 2006), *cert. granted,* 75 U.S.L.W. 3243 (U.S. Nov. 3, 2006) (No. 06-5618). After certiorari was granted in *Claiborne*, the defendant in *Claiborne* passed away, requiring that case to be dismissed. This Court then granted certiorari in *United States v. Gall*, 446 F.3d 884 (8th Cir. 2006), *cert. granted*, 127 S.Ct. 2933 (2007) (No. 06-7949), a case in which the question presented is the same as that presented by Petitioner here.

By granting certiorari in *Gall*, this Court has acknowledged that the appropriate level of scrutiny that courts of appeal should apply when determining the "reasonableness" of sentences imposed by district courts requires review and clarification. Specifically, by granting certiorari in *Gall*, this Court has recognized the importance of clarifying whether it is appropriate after *Booker,* 543 U.S. 220, for district courts to be required to provide extraordinary justifications, in the eyes of appellate judges, when they elect to depart downward from the advisory Guidelines.

Gall is a suitable vehicle for this Court to resolve the question of whether it is appropriate, in the wake of *Booker*, to require that sentences which deviate substantially from the Guidelines be justified by extraordinary circumstances and what the standards of review are for the appellate courts. Absent a grant of certiorari on any additional or subsidiary question raised by this petition, the petition for a writ of certiorari in this case should be held pending the Court's decision in *Gall* and then disposed of in light of that decision.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 07-1393

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JEREMY GOLDBERG,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 05 CR 922 – **Joan B. Gottschall**, *Judge.*

SUBMITTED MAY 29, 2007 – DECIDED JUNE 27, 2007

Before BAUER, POSNER, and WILLIAMS, *Circuit Judges.*

POSNER, *Circuit Judge.* The government appeals from the imposition of a sentence of one day in prison, time served, for a violation of the Child Pornography Prevention Act of 1996. The specific section of the Act that the defendant violated, 18 U.S.C. § 2252A(a)(5)(B), authorizes, so far as bears on this case, the imposition of a maximum prison sentence of 10 years on anyone

who "knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer." For the defendant's particular offense, the federal guidelines sentence range was at least 63 to 78 months – "at least" because, as noted at the end of this opinion, it appears to have been miscalculated in the defendant's favor.

The judge imposed a nominal prison sentence, though her preference was to impose no prison sentence at all, because without imposing a prison sentence she could not have imposed supervised release. The statute that authorizes supervised release, 18 U.S.C. § 3583(a), states that "the court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment." The Sentencing Commission understands supervised release to presuppose a prison sentence. *See* U.S.S.G. ch. 7, pt. A, § 2(b); *see also United States v. Sanchez-Estrada,* 62 F.3d 981, 994 (7th Cir. 1995).

The defendant, who is now 23 years old, is the son of a prosperous couple in the wealthy Chicago suburb of Highland Park. He downloaded file-sharing software that gave him access to a web site called "# 100% PreTeenGirlPics." Over a period of some 18 months, he downloaded hundreds of pornographic photographic images, some depicting children as

young as 2 or 3 being vaginally penetrated by adult males. He offered these images to other subscribers to the web site to induce them to send similar images in return. He masturbated while viewing the pornographic images. He has a history of drug abuse. His lawyers describe him as a "normal young adult."

The district judge justified the remarkably light sentence that she gave the defendant as follows:

> It's a very, very difficult case, but I have concluded that I'm going to begin with a lengthy period of supervision rather than a period of incarceration, with the idea that it's going to be very intensive, and if there is a problem, Mr. Goldberg is going to go away for a very long time.
>
> But the way I look at this case, . . . I think that if I sent Mr. Goldberg away for 63 months or anything close to it with the hope that he gets sex offender treatment in prison, we're pretty much guaranteeing his life will be ruined. And I think there's some possibility here that his life can go in a different way, and I'd like to try that, but I'm very worried, because what's gone on here is very, very difficult for me to deal with. I mean, these pictures, I can't even bear to look at them they're so horrible. And what spiraling downward does to you so that you can stand looking at pictures like that I don't know, but it's spiraling pretty far downward.
>
> The guidelines allow me to place Mr. Goldberg, and I'm going to . . . I don't know

what our current word is . . . deviate from the guidelines under 3553, and I'm going to impose a period . . . as I said, the supervised release can be any years up to life. I'm going to impose a ten-year period of supervised release.

It's more supervised release than I have ever imposed before, but I really think that given the psychiatric reports and given what transpired here, that the period of supervision has to be long enough to ensure that if Mr. Goldberg turns his life in a different direction he does it for a long time.

I also want to make sure that if there is further . . . any evidence of further problem, that the Court retains a handle over Mr. Goldberg for a long time.

Now, during that period of supervision, I really need a little help in figuring out . . . and I have been trying to get the lawyers to give it to me, but I don't know that I've gotten it yet. Maybe it depends on what kind of financial commitment people are able to make, I don't know, but I need to have close supervision in both the drug area and in the therapy area to make sure that we're not having a problem here. And I know that . . . I think Ms. Cohen is the one who suggested some kind of periodic polygraph examinations, and I think that should be an important part of this.

* * *

I think I better now talk about why under Section 3553 I deviated from the guidelines. My reason in this case is less . . . well, it's this: It's considering the history and characteristics of the defendant I think that there's a substantial likelihood . . . and also considering the psychiatric reports, that this offense was committed out of boredom and stupidity and not because Mr. Goldberg has a real problem with the kind of deviance that these cases usually suggest. I believe that if that is correct, and if he is sent to prison for a lengthy period, anything of any consequence at all, I think it's going to ruin his life in many ways.

I think that sex offender treatment within the Bureau of Prisons is going to expose him to people who are dangerous to him. I think any substantial period of incarceration is going to ensure that he's not able to take advantage of his education and get a good job, and I think all of this will reinforce whatever negative things he's done in the past rather than pushing him in a positive direction.

I recognize that the viewing of child pornography over the Internet destroys the lives of young children, but I also recognize that the life that I'm concerned with here, the life that I can affect, is Mr. Goldberg's life, and I don't want to destroy his life in the hope that maybe in some very indirect way it's going to help somebody else's life. I don't think it is. And I would like, if I can, to support him in

> putting his life on a positive direction rather than in destroying it.
>
> The reason for the long period of supervision and the close supervision that I believe I've required is to make sure that if he indeed represents a threat, and if I'm wrong in my assessment of what went on here, that we are able to catch it before any damage is done.
>
> This is kind of an odd balancing of factors under 3553, but I think I do have the discretion in an unusual case like this one to choose not to incarcerate and to choose close supervision to see what transpires over the next few years.

There is also a brief "statement of reasons" appended to the original judgment that the judge entered. But it is omitted from the amended judgment (entered because the original judgment was discovered to contain clerical errors) and is not in the appellate record, although the defendant's counsel quotes from it in his brief and the clerk of the district court has found a copy for us. In the oral statement, which we just quoted, the grounds on which the judge justified the sentence were that the defendant was not a real deviant because he had committed the crime out of "boredom and stupidity," that it would ruin his life to be imprisoned because he would be exposed to "people who are dangerous to him," and that his life, rather than the lives of the small children who had been raped in order to enable the creation of sadistic child pornography to assist the

defendant in masturbating, was the only "life that I can affect." The written statement of reasons is similar. In it the judge attributes the defendant's pornographic activity to boredom resulting from his being confined at home as a result of being convicted of a drug offense and states that he "has normal sexual interests and is not a pedophile, internet or otherwise." She states that "no one argues that any actual children are at risk from any conduct of [the defendant] (other than the harm to children who are used to make images used on the internet)," but she assigns no weight to *that* harm – the harm to the children – consistent with her oral statement that the only life she can affect by her sentence is the defendant's. The written statement assigns weight to the fact that if the defendant is sent to prison, "his education will be interrupted."

These grounds, and the passages we quoted in which they appear, do not comply with the requirement that the sentencing judge conscientiously consider the factors set forth in 18 U.S.C. § 3553(a) to guide sentencing. Those factors, so far as pertain to this case, are

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> * * *
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

A prison sentence of one day for a crime that Congress and the American public consider grave, in circumstances that enhance the gravity (we refer to the character of some of the images), committed by a convicted drug offender, does not give due weight to the "nature and circumstances of the offense" and the "history and characteristics of the defendant." It does not "reflect the seriousness of the offense," "promote respect for the law," or "provide just punishment for the offense." It does not "afford adequate deterrence to criminal conduct." And it creates an unwarranted sentence disparity, since similarly situated defendants are punished with substantial prison sentences. *See, e.g.*, *United States v. Lange,* 445 F.3d 983 (7th Cir. 2006); *United States v. Grigg,* 442 F.3d 560 (7th Cir. 2006); *United States v. Baker,* 445 F.3d 987 (7th Cir. 2006); *United States v. Perez,* No. 06-50041, 2007 WL 1065784 (5th Cir. Apr. 11, 2007); *United States v. Nikonova,* 480 F.3d 371 (5th Cir. 2007); *United States v. Rolfsema,* 468 F.3d 75 (1st Cir. 2006); *United States v. Branson,* 463 F.3d 1110 (10th Cir. 2006). *United States v. Grinbergs,* 470 F.3d 758 (8th

Cir. 2006), reversed a sentence of a year and a day (a sentence 366 times longer than the sentence imposed by the district judge in this case) imposed on a defendant who had pleaded guilty to one count of possessing child pornography and faced a guidelines sentence of 46 to 57 months in prison, lower than our defendant's guidelines sentencing range.

It is true as the defendant points out that the statute under which he was convicted contains no mandatory minimum. But it does not follow that Congress envisaged no prison time for violators. The absence of a mandatory minimum sentence may signify no more than that the legislature did not want to take the time to try to determine what the minimum sentence should be or did not think it could anticipate unusual cases in which a light sentence might be appropriate. We can imagine a case, involving the downloading of a handful of images none showing any prepubescent child or depicting any sexual activity, yet still constituting child pornography (the statute defines "child" as any minor and "pornography" as including besides actual sexual activity "lascivious exhibition of the genitals or pubic area," 18 U.S.C. §§ 2256(1), (2)(A)(v)), in which a permissible sentence might be light. The hundreds of images in this case include as we have noted images of prepubescent children being penetrated by adults.

The district judge was influenced by the erroneous belief that a sentence affects only the life of the criminal and not the lives of his victims. Young children were raped in order to enable the production of

the pornography that the defendant both downloaded and uploaded – both consumed himself and disseminated to others. The greater the customer demand for child pornography, the more that will be produced. E.g., *Osborne v. Ohio,* 495 U.S. 103, 109-11 (1990); *United States v. Barevich,* 445 F.3d 956, 959 (7th Cir. 2006); *United States v. Richardson,* 238 F.3d 837, 839 (7th Cir. 2001); *United States v. Angle,* 234 F.3d 326, 337-38 (7th Cir. 2000). Sentences influence behavior, or so at least Congress thought when in 18 U.S.C. § 3553(a) it made deterrence a statutory sentencing factor. The logic of deterrence suggests that the lighter the punishment for downloading and uploading child pornography, the greater the customer demand for it and so the more will be produced.

Why the fact that the defendant committed the offense out of "boredom and stupidity," if it were a fact, should be thought a mitigating factor escapes us and was not explained by the judge. Anyway it is not a fact; the defendant obtained sexual gratification from the pornographic images that he so sedulously collected. It is also inconsistent with the 10-year term of supervised release that the judge imposed, which includes conditions that require the defendant's participation in programs for the psychological treatment of sex offenders.

The judge's suggestion that the defendant does not have "a real problem" could be interpreted to mean that she disparages Congress's decision to criminalize the consumption and distribution of child pornography, perhaps because she thinks that only

people who actually molest children, rather than watching them being molested, have "a real problem." This interpretation is reinforced by her statement elsewhere in the transcript of the sentencing hearing that the defendant's crime was just "a kind of mischief." This characterization cannot be reconciled with the judge's having fully credited (as she said she did) the report of a psychologist who stated that the defendant has been using pornography for more than a decade, that he "believed he was smart enough not to get caught and if he were caught he believed he would not have any consequences," that he has "little knowledge, understanding or empathy for the little girls depicted in the images," that "he began using pornography when he was 12-13 and continues to fantasize about the same age girls he looked at then," that he has "persistent sexual interest in adolescent males and females," that he is a "pedophile," that he "has admitted to other deviant behaviors, namely voyeurism, scatological phone calls and the stealing of a 14 year old girl's panties," that he has "sociopathic traits," that "he doesn't think of the consequences of his behavior," that "he has had two convictions within two years," and that "he has little respect for the law or social conventions."

The district judge's assertion "that sex offender treatment within the Bureau of Prisons is going to expose [the defendant] to people who are dangerous to him" is ill informed. Sex-offender treatment in federal prisons is voluntary. Statement of Andres E. Hernandez, Director of the Sex Offender Treatment

Program Federal Correctional Institution Butner, N.C., Concerning "Sexual Exploitation of Children Over the Internet: The Face of a Child Predator and Other Issues," Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce, 152 Cong. Rec. D1035-01, D1038 (Sept. 26, 2006), http://projectsafechildhood.gov/HernandezTestimonyCongress.pdf, p. 2 (visited June 1, 2007). And "the vast majority" of sex offenders in the program are individuals convicted of "Possession, Receipt, Distribution, and Transportation of Child Pornography," like the defendant. *Id.* at 3. The judge gave no explanation for why she thought a prison sentence would be more ruinous for the defendant than for any other imprisoned criminal other than her mistaken belief that he would be thrown in with violent sexual offenders.

The judge's balancing of the section 3553(a) sentencing factors was indeed "odd," as she acknowledged, but, more to the point, it was unreasonable. *United States v. Roberson,* 474 F.3d 432, 435 (7th Cir. 2007); *United States v. Repking,* 467 F.3d 1091, 1094 (7th Cir. 2006) (per curiam); *United States v. Walker,* 447 F.3d 999, 1007 (7th Cir. 2006). When the guidelines, drafted by a respected public body with access to the best knowledge and practices of penology, recommend that a defendant be sentenced to a number of years in prison, a sentence involving no (or, as in this case, nominal) imprisonment can be justified only by a careful, impartial weighing of the statutory sentencing factors. It may not be based on

idiosyncratic penological views (such as that the severity of criminal punishment has no significance for the victims of crime, but only for the criminals), disagreement with congressional policy, or weighting criminals' interests more heavily than those of victims and potential victims. *See, e.g., United States v. Grinbergs, supra,* 470 F.3d at 759; *United States v. Davis,* 458 F.3d 491, 498-500 (6th Cir. 2006); *United States v. Martin,* 455 F.3d 1227, 1239-42 (11th Cir. 2006); *United States v. Crisp,* 454 F.3d 1285 (11th Cir. 2006); *United States v. Robinson,* 454 F.3d 839 (8th Cir. 2006); *United States v. Cage,* 451 F.3d 585, 595-96 (10th Cir. 2006). The judge neglected considerations of deterrence and desert, which dominate the federal criminal code, in favor of undue emphasis on rehabilitation, and seemed even to think that any prison sentence, however short, is inconsistent with rehabilitation. That is not the theory of either the criminal code or the Sentencing Reform Act, which actually downplays the significance of rehabilitation as a penological goal by rejecting imprisonment as a means of promoting it. 28 U.S.C. § 994(k); *Mistretta v. United States,* 488 U.S. 361, 367 (1989); *Kerr v. Puckett,* 138 F.3d 321, 324 (7th Cir. 1998).

Finally, the guidelines sentencing range appears to have been miscalculated. The district judge did not make the upward adjustment required by U.S.S.G. § 2G2.2(b)(3) for sadistic images, even though at the sentencing hearing the government pointed out that some of the images on the defendant's computer involved "bondage of these young children" and

"sadistic and masochistic sexual activity with these children," as well as girls "as young as two and three years old being vaginally penetrated with an adult male penis."

We do not rule that a sentence below a properly calculated guidelines range would have been improper in this case. The guidelines are merely advisory, and the statutory sentencing factors (a laundry list of incommensurables which guides consideration but does not dictate the sentence or even the sentencing range) leave plenty of discretion to the sentencing judge. But that discretion was abused in this case, and the judgment is therefore reversed and the case remanded for resentencing.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States District Court
Northern District of Illinois

UNITED STATES OF AMERICA
v.
Jeremy David Goldberg

Case Number: 05-CR-922-1
Judge: Arlander Keys

Theodore Poulos, Defendant's Attorney
Thomas Keith, AUSA

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Date of Original Judgment: December 20, 2006

Reason for Amendment: Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

THE DEFENDANT ENTERED A PLEA OF:

guilty to Count(s) One of the Information, which was accepted by the court.

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

Title & Section	Description of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. §2252A(a)(5)(B)	Possession of Child Pornography	08/09/2004	One

The defendant is sentenced as provided in the following pages of this judgment. The Sentence is imposed pursuant to the Sentencing Reform Act of 1984. Other than the amendments or modifications stated in this judgment, the judgment entered December 20, 2006 is to stand (see attachment)

IMPRISONMENT

IT IS THE JUDGMENT OF THIS COURT THAT:

the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **One (1) day with time considered served.**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for the periods specified for each count of conviction.

* The defendant is sentenced on all count(s) of conviction, namely, Count One to a term of Ten (**10**) years.

It is further ordered that the costs of supervision are waived.

The defendant shall report immediately to the probation office in the district in which the defendant is to be supervised, but no later than seventy-two hours after sentencing. In addition, see the attached page(s) defining the mandatory, standard

and discretionary conditions of supervised release that apply in the case.*

Other conditions imposed by the court:

* Defendant is permitted to travel within the Continental United States and must keep Probation Officer informed of his travel plans and or itinerary.

* The defendant shall serve 100 hours of Community Service per year of supervision.

Date of Imposition of Judgment/Sentencing: December 20, 2006

/s/ Joan B. Gottschall
JOAN B. GOTSCHALL
UNITED STATES DISTRICT JUDGE

Dated at Chicago, Illinois this 26 day of January, 2007

DEFENDANT IDENTIFICATION INFORMATION

Defendant's Last Known Address: XXXXXXXXXXXXXXXX
Tucson, Arizona 85719

DOB: XXXXXXX, 1983
USM#: 18307-424
SSN: XXX-XX-XXXX

United States District Court
Northern District of Illinois

UNITED STATES OF AMERICA	)	**Case Number: 05-CR-922-1**
v.	)	**Judge: Arlander Keys**
Jeremy David Goldberg	)	

Theodore Poulos,
Defendant's Attorney
Thomas Keith, AUSA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On
or After November 1, 1987)

THE DEFENDANT ENTERED A PLEA OF:

guilty to Count(s) One of the Information, which was accepted by the court.

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

Title & Section	Description of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. §2252A(a)(5)(B)	Possession of Child Pornography	08/09/2004	One

The defendant is sentenced as provided in the following pages of this judgment.

IMPRISONMENT

IT IS THE JUDGMENT OF THIS COURT THAT:

the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **One (1) day with time considered served.**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for the periods specified for each count of conviction.

The defendant is sentenced to all count(s) of conviction, namely, said periods to run concurrent.

It is further ordered that the costs of supervision are waived.

The defendant shall report immediately to the probation office in the district in which the defendant is to be supervised, but no later than seventy-two hours after sentencing. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of probation that apply in this case.

MANDATORY CONDITIONS OF SUPERVISED RELEASE (As set forth in 18 U.S.C. § 3583 and U.S.S.G. § 5D1.3)

1) For any offense, the defendant shall not commit another federal, state or local crime;

2) for any offense, the defendant shall not unlawfully possess a controlled substance;

3) for offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within fifteen days of release from imprisonment and at least two periodic drug tests thereafter for use of a controlled substance as determined by the court: Not to exceed 104 test per year.

4) for a domestic violence crime committed on or after September 13, 1994, as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a rehabilitation program in accordance with 18 U.S.C. § 3583(d);

5) for a defendant classified as a sex offender pursuant to 18 U.S.C. § 4042(c)(4), the defendant shall comply with the reporting and registration requirements set forth in 18 U.S.C. § 3583(d);

6) the defendant shall cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 and the Justice for All Act of 2004; and

7) The defendant shall pay any balance on the special assessment, restitution and/or fine imposed against the defendant.

STANDARD CONDITION OF SUPERVISED RELEASE

1) For any felony or other offense, the defendant shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer (travel outside the continental United States requires court authorization);

3) the defendant shall report to the probation officer as directed by the court or the probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall provide to the probation officer access to any requested financial information including, but not limited to, tax returns, bank statements, credit card statements, credit applications, etc.;

6) the defendant shall support his or her dependents and meet other family responsibilities;

7) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer

for schooling, training, or other acceptable reasons;

8) the defendant shall notify the probation officer ten (10) days prior to any change in residence or employment;

9) the defendant shall refrain from excessive use of alcohol;

10) the defendant shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as requested by the probation officer to determine the use of any controlled substance;

11) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

12) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

13) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

14) the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

15) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

16) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and

17) if this judgment imposes a special assessment, restitution or a fine, it shall be a condition or supervised release that the defendant pay any such special assessment, restitution or fine in accordance with the court's order set forth in the Criminal Monetary Penalties sheet of this judgment.

Other conditions imposed by the court:

The defendant shall participate in substance abuse treatment if directed by the probation department.

The defendant shall participate in a mental health and/or sex offender treatment program, as directed by the probation department, and take any prescribed medications.

The defendant shall participate in Group and Individual Therapy with treatment specializing in the treatment of sexual misbehavior.

The defendant is prohibited from viewing any pornographic sites on the internet.

The defendant shall participate in periodic polygraphic examination (once a year).

Pursuant to 18 U.S.C. §§§3563(a), 3583(d) and 4209 as a mandatory provision of supervised release, an offender convicted of any of the Federal sex offenses described in 18 U.S.C. §4042(c)(4), and adhere to any and all provisions that are included in the Illinois State Sex Offender Registration laws.

As another special condition, the defendant shall neither possess nor have under his control any "matter" that is pornagraphic in nature, depicts/alludes to sexual activity, or depicts minors under the age of 18. This includes, but is not limited to, any "matter" obtained through access to any computer or any material linked to computer access/use.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the "Schedule of Payments." Unless waived, the defendant shall pay interest on any restitution and/or fine of more than $2,500, unless the restitution and/or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). The payment options may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment(s)	Total Fine	Restitution	**Mandatory Costs of Prosecution**
$100.00	**$2,500.00**	**$**	**$**

The defendant shall notify the United Stats Attorney's Office having jurisdiction over the defendant within thirty days of any change of name, residence or mailing address until all special assessments, restitution, fines, and costs imposed by this judgment are fully paid.

SCHEDULE OF PAYMENTS

- Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs. If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment.

- All criminal monetary penalty payments, except those payments made through the Bureau of Prisons Inmate financial Responsibility Program, are to be by money order or certified check payable to the Clerk of the Court, U.S. District Court, unless otherwise directed by the Court.

- Unless waived, the defendant shall pay interest on any fine and/or restitution of more than $2,500, unless the same is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). Payment options included herein may be subject to penalties of default and delinquency pursuant to 18 U.S.C. § 3612(g).

- Pursuant to 18 U.S.C. §§ 3613(b) and (c) and 3664(m), restitution and/or fine obligations extend for twenty years after release from imprisonment, or from the date of entry of judgment if not sentenced to a period of imprisonment.

Payment of the total criminal monetary penalties shall be due as follows:

In installments:

Monthly installments of 10% of net income.

Pursuant to 18 U.S.C. § 3664(k) the defendant must notify the court of any material changes in the defendant's economic circumstances. Upon such notice, the court may adjust the installment payment schedule.

Pursuant to 18 U.S.C. § 3664(n), if a person is obligated to provide restitution, or pay a fine, received substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

The Defendant shall serve a sentence of Probation.

Date of Imposition of Judgment/Sentencing: December 20, 2006

/s/ Joan B. Gottschall
JOAN B. GOTTSCHALL
UNITED STATES DISTRICT JUDGE
Dated at Chicago, Illinois this 8 day of January, 2007.

STATEMENT OF REASONS
[Not for Public Disclosure]

I COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

The court adopts the presentence investigation report without change.

III COURT DETERMINATION OF GUIDELINE RANGE (BEFORE DEPARTURES):

Total Offense Level: 26

Criminal History Category: I

Imprisonment Range: 63 to 78 months

Supervised Release Range: Any Years Up to Life

Fine Range: 12,500.00 to 125,000.00

Fine waived or below the guideline range because of inability to pay.

IV COURT GUIDELINE SENTENCING DETERMINATION:

The court departs from the guideline range for reasons authorized by the sentencing guidelines. (Also, complete Section V.

V DEPARTURES AUTHORIZED BY THE GUIDELINES (if applicable).

A. The sentence imposed departs:

Below the guideline range

B. Departure pursuant to:

Whether the guideline sentence is a reasonable sentence in this case (63-78 months) or whether a proper weighing of §3553 factors leads to a different and more reasonable sentence, depends upon whether the court adopts the Government's or the defense's narrative of what this case is about. The court adopts the defense narrative and concludes that the guideline sentence is unreasonable. At the same time, to minimize any risk of error, the court imposes an unusually long period of supervision (10 years) and adopts most of the conditions suggested by the Government's expert as appropriate conditions of supervision.

Neither side in this case suggests that Mr. Goldberg represents any likelihood of actually harming children himself. Both sides' experts agree that their testing indicates that Mr. Goldberg has never molested children and is not likely ever to do so. However, the government contends that Mr. Goldberg is "an internet pedophile," meaning a person who has in the past, and is likely in the future, to look at images of child pornography on the internet and receive sexual gratification from doing so. As an internet pedophile, the Government contends that Mr. Goldberg's likelihood of recidivism is high. The Government believes that sex offender treatment in the Bureau of Prisons is the appropriate punishment in this case.

The defense claims that Mr. Goldberg was an immature and judgmentally challenged young man who, confined to his home as a result of a misdemeanor

marijuana conviction, became bored and dealt with his boredom (as well as with his sense of disphoria and depression) by setting up and running a technologically sophisticated pornography trading site. The defense argues that Mr. Goldberg is fundamentally decent, from a strong and supportive family, who is emerging from a history of academic and personal problems from ADD (including marijuana use) with a college degree on the near horizon. Importantly, the defense argues (with the backing of their psychiatrist) that Mr. Goldberg has normal sexual interests and is not a pedophile, internet or otherwise. The defense argues, and having seen and heard from Mr. Goldberg the court agrees, that Mr. Goldberg committed this crime without understanding the seriousness of his conduct or the way such conduct harms other people.

Along with consideration of the §3553 factors, the court has considered the risks of error should it adopt the wrong narrative. Given that no one argues that any actual children are at risk from any conduct of Mr. Goldberg (other than the harm to children who are used to make images used on the internet), the court believes that potential harm to society from any recidivism by Mr. Goldberg can be substantially minimized by adopting most of the conditions of supervision suggested by the Government's expert: *see* page 4 of letter of Gabriella Cohen. Thus, given the kind of harm any recidivism by Mr. Goldberg is likely to cause based on the Government's narrative can be minimized and perhaps eliminated. At the

same time, the court believes that the Government's suggestion that there should be "consequences" to Mr. Goldberg from his conduct can be satisfied by this felony conviction, an extremely length[y] period of supervision, a substantial requirement of community service, a fine, and the lifetime of sex offender registration that the law will require of Mr. Goldberg, with all the difficulties this kind of conviction is likely to create for him.

On the other hand, the costs of error if the defense narrative is correct and the court sends Mr. Goldberg to prison are enormous. His education will be interrupted, his self-esteem will be irreparably injured and he will spend considerable time in his young life with persons whose deviance is far ore significant and dangerous than his own. In addition, Mr. Goldberg will be deprived of the opportunity to finish his education, start a career and start a family at the normal time of life, throwing him off track when his problem heretofore has been his difficulties getting on track. If the defense narrative is correct, a sentence of imprisonment with the possibility of sex offender treatment, coupled with the unavoidable collateral consequences of this type of conviction, are likely to injure Mr. Goldberg in significant and irreparable ways.

Having reviewed the psychiatric reports submitted by both parties, the court believes that the defense narrative is probably correct. Under §3553, that being the case, the nature and circumstances of the offense, and the history and characteristics of the defendant,

suggest a long period of supervision with intense conditions of supervision and not imprisonment. A felony sex offense conviction, with a long period of supervision, a fine and community service, plus collateral consequences such as registration as a sex offender, is adequate to reflect the seriousness of the offense, promote respect for the law, impose just punishment, afford adequate deterrence, protect the public from further crimes of the defendant and provide the defendant with the supervision and treatment that he needs.

Defendant's Residence Address:	XXXXXXXXXXXXXXX Tucson, Arizona 85719
Date of Birth:	XXXXXXX, 1983
U.S. Marshal Number:	18307-424
Social Security Number:	XXX-XX-XXXX

/s/ Joan B. Gottschall
JOAN B. GOTSCHALL
UNITED STATES DISTRICT JUDGE

Dated at Chicago, Illinois this 8 day of January, 2007

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
-vs-	)	No. 05 CR 922
JEREMY GOLDBERG,	)	Chicago, Illinois
	)	December 20, 2006
Defendant.	)	12:00 p.m.

TRANSCRIPT OF PROCEEDINGS –
SENTENCING HEARING BEFORE THE
HONORABLE JOAN B. GOTTSCHALL

APPEARANCES:

For the Government: MR. THOMAS A. KEITH
Special Assistant United States
Attorney For the
Northern District
One Technology Plaza, Suite 400
211 Fulton Street
Peoria, Illinois 61602

For the Defendant: COTSIRILOS, TIGHE &
STREICKER, LTD.
33 North Dearborn Street
Suite 600
Chicago, Illinois 60602
BY:
MR. TERENCE H. CAMPBELL
MR. THEODORE T. POULOS

COLETTE M. KUEMMETH, CSR, RMR
OFFICIAL COURT REPORTER
219 South Dearborn Street
Room 2328A
Chicago, Illinois 60604
(312) 554-8931

[70] Thank you, your Honor.

THE COURT: This case – you can have a seat, Mr. Goldberg.

It's a very, very difficult case, but I have concluded that I'm going to begin with a lengthy period of supervision rather than a period of incarceration, with the idea that it's going to be very intensive, and if there is a problem, Mr. Goldberg is going to go away for a very long time.

But the way I look at this case, I guess as I said earlier, I think that if I sent Mr. Goldberg away for 63 months or anything close to it with the hope that he gets sex offender treatment in prison, we're pretty much guaranteeing his life will be ruined. And I think there's some possibility here that his life can go in a different way, and I'd like to try that, but I'm very worried, because what's gone on here is very, very difficult for me to deal with. I mean, these pictures, I can't even bear to look at them they're so horrible. And what spiraling downward does to you so that you can stand looking at pictures like that I don't know, but it's spiraling pretty far downward.

The guidelines allow me to place Mr. Goldberg, and I'm going to – I don't know what our current

word is – deviate from the guidelines under 3553, and I'm going to impose a period – as I said, the supervised release can be [71] any years up to life. I'm going to impose a ten-year period of supervised release.

It's more supervised release than I have ever imposed before, but I really think that given the psychiatric reports and given what transpired here, that the period of supervision has to be long enough to ensure that if Mr. Goldberg turns his life in a different direction he does it for a long time.

I also want to make sure that if there is further – any evidence of further problem, that the Court retains a handle over Mr. Goldberg for a long time.

Now, during that period of supervision, I really need a little help in figuring out – and I have been trying to get the lawyers to give it to me, but I don't know that I've gotten it yet. Maybe it depends on what kind of financial commitment people are able to make, I don't know, but I need to have close supervision in both the drug area and in the therapy area to make sure that we're not having a problem here. And I know that – I think Ms. Cohen is the one who suggested some kind of periodic polygraph examinations, and I think that should be an important part of this.

MR. KEITH: Your Honor, if I could add, we can't impose supervision without a period of incarceration. And the maximum term of probation would be five years in this [72] case.

THE COURT: Oh, I can't impose supervised release – that's right. I can't impose supervised release without incarceration. Can I impose – I'm wondering if I can impose a day of incarceration. You know, five years in this case, I don't know. I just am not comfortable with that.

MR. POULOS: Judge, you hit it right on the head. I've had a prior case where Judge Kennelly imposed a sentence of one day, time considered served, followed by whatever period of supervised release the Court –

THE COURT: I think I can do that, because I really think – obviously, if Mr. Goldberg is doing really well, and the polygraph exams are good, and the reports from the therapists are good, and there's no drug problem, terminating supervision early is no big deal. But as things stand now, with the number of questions that I have about what's in store for Mr. Goldberg, I prefer to have a longer period of supervised release.

Now, maybe – does the Government think it's – does the Probation Office think it's unreasonable?

MS. TOLLE: In terms of imposing one day considered served?

THE COURT: No, in terms of a ten-year period of supervision.

[73] If probation doesn't want to supervise somebody for that long, I will yield to that. But I personally feel that, you know, we've got somebody in

college, Mr. Goldberg presumably is going to finish college, he's then going to have a transition period where he's trying to figure out what he's going to do with his life – I mean, we're already at a couple years into this, it seems to me, before we really have a situation where Mr. Goldberg hopefully is getting employment, is getting involved with his own family. I mean, there's a long period, I think maybe longer than five years, before I feel sure that we're on the right path in this case if we're going down the right path.

So I know that the Government doesn't have a great deal of money, and I know supervision is expensive. It's a lot cheaper than incarceration, that's for sure. But I would like – I would rather, you know, frankly, I would like to do it this way. I would like to do it this way.

So I'm going to impose a day of incarceration time considered served, and I'm going to go ahead with the ten-year supervised release that I think is appropriate. And as I said, if the therapists say in five years that enough is enough, and everything is going fine, believe me, I can deal with it.

Does anybody want to say anything about that part of the sentence before I go on to the other parts of the [74] sentence?

MR. CAMPBELL: Only that – I think the Court said it, but just so the record is clear, the Court has considered the factors set forth in 3553(a) –

THE COURT: I was going to do that.

MR. CAMPBELL: Yes.

THE COURT: First of all, I want to get the sentence out, and then I'll go ahead and give the justification for it.

MR. CAMPBELL: Thank you, Judge.

THE COURT: Actually, I want to say that I agree with everything that Ms. Cohen said in her report. I really believe that – you know, the problem of use of the Internet is very complicated. How do we prevent Mr. Goldberg from being tempted to go back to this and still permit him to go to college, and get employment, and do the other things. You can't do any of that without the Internet. So I don't know how we do that. That's the biggest problem I see here.

Can we put – I mean, if Mr. Goldberg has his own computer, can we put controls on it that he has to agree to? What can we do?

MR. CAMPBELL: Judge, I don't know the answer to that. You can certainly put controls on through some software, but I suppose the best way it seems to me to monitor that is through the supervision.

[75] THE COURT: The polygraph.

MR. CAMPBELL: The Probation Office and the polygraph.

THE COURT: I agree that Mr. Goldberg requires close monitoring and supervision. I agree that he should participate in group therapy and individual therapy aimed at this sex offender treatment. I believe – Ms. Cohen says a yearly polygraph. I guess that's sufficient. I don't know.

He must be prohibited from the use of pornographic materials of any kind. I agree with this. Because Mr. Poulos talked about some spiraling downward; I don't know about spiraling downward but if you're right, the best way to prevent that is to keep away from these things entirely.

I think I can authorize urine drops up to 104 tests per year. Is that right? To make sure there is no drug use.

MS. TOLLE: Are you going to be ordering that he participate in drug treatment?

THE COURT: I don't know if Mr. Goldberg needs drug treatment, but I think he needs to be tested to see if he needs drug treatment.

MS. TOLLE: If it's just the drug testing, then that would be what you just –

THE COURT: Up to 104 tests per year.

Is there any need for drug treatment at this point? Or desire for it?

[76] MR. POULOS: Judge, he did participate in a treatment program. He hasn't had any

problems whatsoever. I don't know that that part of it is necessary. We have no objection to the testing.

THE COURT: The testing I'm requiring. And if there is any problem with the testing, then we're going to have to modify this to provide for some treatment.

I'm not going to prohibit Mr. Goldberg from having contact with minors, because there is nothing that suggests that he's an actual hands-on threat to minors.

However, let me say this, Mr. Goldberg: If there are any complaints about you, whether they're truthful or not truthful, you're in a very vulnerable position, and I think it would be in your benefit for a couple of years not to have any unsupervised contact with minors. I would just say that to you because believe me, if somebody complains, all of our backs are going to be up against the wall. Okay? You understand what I'm saying to you?

DEFENDANT GOLDBERG: Yes, your Honor.

THE COURT: You have to protect – assuming that you're doing well, you have to protect yourself from anybody's accusations. And I don't know – what do you want to be? A teacher? Is that what your career goal is?

DEFENDANT GOLDBERG: There was a time when it was, yes. I don't know if that's a possibility anymore, your [77] Honor.

THE COURT: I don't know either. But don't be an elementary school teacher, okay? Not for the next ten years.

I think I better now talk about why under Section 3553 I deviated from the guidelines. My reason in this case is less – well, it's this: It's considering the history and characteristics of the defendant I think that there's a substantial likelihood – and also considering the psychiatric reports, that this offense was committed out of boredom and stupidity and not because Mr. Goldberg has a real problem with the kind of deviance that these cases usually suggest. I believe that if that is correct, and if he is sent to prison for a lengthy period, anything of any consequence at all, I think it's going to ruin his life in many ways.

I think that sex offender treatment within the Bureau of Prisons is going to expose him to people who are dangerous to him. I think any substantial period of incarceration is going to ensure that he's not able to take advantage of his education and get a good job, and I think all of this will reinforce whatever negative things he's done in the past rather than pushing him in a positive direction.

I recognize that the viewing of child pornography over the Internet destroys the lives of young children, but I also recognize that the life that I'm concerned with here, [78] the life that I can affect, is Mr. Goldberg's life, and I don't want to destroy his life in the hope that maybe in some very indirect way it's going

to help somebody else's life. I don't think it is. And I would like, if I can, to support him in putting his life on a positive direction rather than in destroying it.

The reason for the long period of supervision and the close supervision that I believe I've required is to make sure that if he indeed represents a threat, and if I'm wrong in my assessment of what went on here, that we are able to catch it before any damage is done.

This is kind of an odd balancing of factors under 3553, but I think I do have the discretion in an unusual case like this one to choose not to incarcerate and to choose close supervision to see what transpires over the next few years.

Okay. There's some other things I have to do here. There's a special assessment of $100. It's due immediately. Will it be paid today?

MR. POULOS: Yes.

THE COURT: Okay. There is a fine under the guidelines – and no fine has been recommended. I think that we've got to talk about some consequences and some payback to society in this case, and I think that there are two areas in which I'd like to discuss this with the parties before you [79] all disappear. One is a fine and one is community service.

Now, I know that this kind of offense presents problems in terms of community service, but it seems to me there ought to be some kinds of community service that Mr. Goldberg could do that would not

involve dealing with pre-adult females that would be some way of attaching some consequences to this offense and that would allow Mr. Goldberg in some way to pay back society for having committed this offense.

I would like to impose a fine, but I would like it to be a fine that Mr. Goldberg pays if and when he is employed. I don't want his family to step up to the plate and take care of this for him. And given that he isn't employed at the present time, is there any way that I can do that? Can I set a fine payable at the rate of 10 percent of Mr. Goldberg's net monthly income if and when he has net monthly income?

MS. TOLLE: Your Honor, you could set it up that way, but the money can come from anywhere. There is no way to say if it – if you impose a fine of $5,000 and it's paid tomorrow, we can't say no, we're not going to take it because it didn't come from Jeremy's employment.

THE COURT: Well –

MS. TOLLE: So you can't really make that happen.

THE COURT: Okay.

[80] MR. POULOS: Judge, I think Mr. Goldberg's family has heard you loud and clear. The Goldbergs have indicated to me they will not pay his fine. The fine will be paid from Jeremy's own resources whenever he's able to pay.

THE COURT: Does Jeremy have net monthly income now?

MR. POULOS: No. No, your Honor.

THE COURT: All right. Then I'm going to impose a $2500 fine, payable at the rate of 10 percent of Mr. Goldberg's net monthly income.

So when you get a job – I mean, the probation officer has said if somebody in generosity pays it for you there's nothing we can do about that, but I think that you ought to pay it, and I think you ought to pay it when you start working.

Now, what about this community service? Because Mr. Goldberg is an able person, and there is plenty of need out there that doesn't involve children. And it just seems to me as an alternative to incarceration there is no reason why Mr. Goldberg can't do some kind of community service. We probably can't do it – we can't do it through the probation office, right? Because that would – or can we do it through the probation office?

MS. TOLLE: If you order it as a condition of his supervision, we would monitor it and I assume help him get [81] set up.

THE COURT: And whoever sets it up will take account of the fact what kind of offense this is, and they will assign him to something accordingly?

MS. TOLLE: I would certainly assume so, your Honor.

THE COURT: Okay. I'm going to require that then. Let me just think through what makes sense on an annual basis.

Let me ask the probation office: What's typical? What do you find reasonable for a young person?

MS. TOLLE: I mean, your Honor, he's in college right now, so he's – I suppose he has more free time now than he might have when he has a full-time job, but every case is different. And you have him on a period of ten years of supervision; I mean, typically I would recommend along the lines of 100 hours per year.

THE COURT: Per year. Okay. 100 hours per year community service.

MR. POULOS: Judge, I know that there are nursing home and geriatric centers that are – perhaps there may be flexibilities; however, I was going to suggest that I think the Court could direct that it be a geriatric center or nursing home, but perhaps there may be flexibility.

THE COURT: If the probation officer is willing [82] to – if the probation office can supervise this, I think they ought to supervise it obviously if they'll take into consideration that it shouldn't be in a nursery school for all kinds of reasons.

Let me see if there is anything else.

There was a plea in this case. Was there a plea agreement?

MR. POULOS: No, your Honor.

THE COURT: It was a blind plea. All right.

There are a couple of other things that I have to say about the supervision, and I will go through them now. It's going to sound rote; but these things need to be said.

While on supervised release, the defendant shall not commit another federal, state, or local crime, shall comply with the standard conditions that have been adopted by the Court; additionally, the defendant shall not possess a firearm or destructive device.

Mr. Goldberg, you have been convicted of a federal felony. You may never again own a gun, or a bomb, or anything like that without permission from the Attorney General of the United States.

The defendant shall refrain from any unlawful use of a controlled substance. As I said, I'm not going to require drug treatment unless there appears at some point to be a need for it, but I am going to allow urine testing, not [83] to exceed 104 tests per year.

If the Probation Office directs, then the defendant shall participate in a substance abuse program.

The defendant shall participate in a mental health and/or sex offender treatment program as directed by the Probation Department and take any prescribed medication.

Now, this says "pursuant to," and then there is a whole bunch of statutes that as a mandatory provision of supervised release I must require that Mr. Goldberg register as a sex offender, or does the law simply require that?

MS. TOLLE: The law requires that.

THE COURT: Okay. Well, the law requires it, the law requires it. Then I don't have to do it.

Mr. Goldberg, you need to keep the Probation Office informed of all of your addresses and phone numbers. If you move, she needs to know about it before it happens, okay?

I'm going to require a polygraph at least once a year.

MR. CAMPBELL: Judge, on that, the issue there for the subject matter of the polygraph is whether he's viewed any pornography?

THE COURT: Yes. Whether he's viewed any pornography. And also, I think that whether Mr. Goldberg has had any inappropriate sexual contact with minors. I don't think any of us know the connection between those things, [84] right?

MR. KEITH: Your Honor, I think if you're going to do a polygraph, it would be something that would be to cover or focus on whatever the treatment-people would think is necessary.

THE COURT: I think that's best. Who is going to be doing the treatment, and how do I order

treatment? Does that come from the Probation Office or what?

MS. TOLLE: Your Honor, typically we contract out with a facility. We don't obviously do it in-house. I believe that the agency that Ms. Cohen works at is one of the facilities or businesses that we use, so it's very possible that he would be seen there, but it might be in terms of where he's living. During the period of time he's at school, I'm not exactly sure how they do it in Arizona, so that could be different.

THE COURT: Well, I'd certainly be comfortable with Ms. Cohen based on her report, but I think Probation will direct that.

The defendant shall submit to the collection of a DNA sample at the direction of the United States Probation Office. The special assessment of $100 is due immediately. I set a schedule for the fine. That's 10 percent of net monthly income.

Mr. Goldberg, you have a right to appeal. If you [85] want to appeal, you have to file what's called a notice of appeal within ten days of the date of judgment. The date of judgment may be today, or it's whenever we get the sentencing order written up.

If you do not file that notice of appeal within ten days, you lose your right to appeal. So you should talk to your lawyers right away about whether you want to do that.

Is there anything else that I need to do?

MS. TOLLE: I'm not sure what you ended up with in terms of Internet use or – honestly, I'm not sure what kind of controls the probation Office – I don't think that we can –

THE COURT: You know, frankly, if somebody says you can't use the Internet, you may as well not be employed. So I think what I'm going to do is as a condition of supervised release Mr. Goldberg is prohibited from looking at any pornography sites on the Internet, period. And I won't get involved in it beyond that. Maybe that's something that the polygraph examination ought to look at as well.

And I think I should also prohibit Mr. Goldberg from looking at pornography, and that means on television or in the movies, in magazines, or any other – just don't do it for ten years.

Anything further?

MR. POULOS: Judge, as the Court knows, he travels [86] back and forth, so his travel is not confined to the – his life is not confined to the Northern District of Illinois, your Honor, and to avoid what's often the case, calling your clerk or coming in on a motion every time he needs to leave, may he be permitted to have, at the discretion of the probation officer, travel within the continental U.S.?

THE COURT: Well, I want to say that it's my intention that Mr. Goldberg finish school, and I'm going to leave it to the discretion of the Probation Office to keep track of his whereabouts. Mr. Goldberg

is ordered to keep – to make sure the Probation Office always knows his whereabouts. If he's in Chicago, if he's in – Arizona, is it? Wherever it is, you need to tell the probation officer before you travel, okay?

MS. TOLLE: Is he limited to those two?

THE COURT: I don't really think so. Presumably Mr. Goldberg is going to be interviewing for employment and all kinds of things. I'm not going to restrict him, but I am going to require that he keep the probation officer informed.

MR. POULOS: Finally, your Honor – I don't know if – maybe we addressed this, but your Honor, I think it's necessary if this is your intent that you specify that the cost of his supervision be waived so that – otherwise it will be really a financial penalty. I'm sure his parents will support him and if necessary pay that cost, but he can't [87] pay the cost of his supervision right now, which I think is 200 and some dollars a month.

THE COURT: Yes, I think it's probably too much to ask. Mr. Goldberg could probably pay some of it, but he's got a substantial fine to pay once he's working, and I think I'm going to waive all the additional costs.

MR. POULOS: Thank you.

MR. CAMPBELL: One last housekeeping matter, Judge. It's something that's come up in some other cases. On the judgment and commitment form I think there is a box that you check with the

restitution or the fine that says payable immediately. If you check that, we will get a letter within a week from the financial litigation unit saying you have to pay this right now, even though we've had in other cases the judge say I want this paid at 10 percent. So I would just ask the Court to be specific.

THE COURT: We'll say immediately on the special assessment. We will put 10 percent of net monthly income, but not check immediately on the fine.

MR. CAMPBELL: Thank you, Judge.

THE COURT: Okay. Well, this is a very, very difficult case because – for obvious reasons. And I guess there is really nothing else I really want to say. I understand where the Government is coming from. I'm hoping that Mr. Goldberg didn't understand when he did this the [88] effects on other people of this kind of conduct. Its not just about you, it's really about all those people who had to be injured for all of those images to exist.

I guess that's really all I'm going to say today. That's it.

MR. KEITH: Thank you for staying late.

(End of proceedings.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled case on December 20, 2006.

/s/ [Illegible]
Court Reporter

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3553(a), (c): Imposition of a Sentence

(a) *Factors to be considered in imposing a sentence.* The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act

of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * *

(c) *Statement of reasons for imposing a sentence.* – The court. at the time of sentencing. shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera

in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

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18 U.S.C. § 3742(e): Review of a Sentence

(e) *Consideration.* – Upon review of the record, the court of appeals shall determine whether the sentence –

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b), or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de nova the district court's application of the guidelines to the facts.

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18 U.S.C. § 2252A(a)(5)(B): Certain activities relating to material constituting or containing child pornography

(a) Any person who –

* * *

(5) either –

* * *

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

* * *

Shall be punished as provided in subsection (b).

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18 U.S.C. § 2252A(b)(2)

(b)(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, * * *

No. 07-436

In the Supreme Court of the United States

JEREMY GOLDBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

Petitioner contends that the standards applied by the court of appeals in reviewing his below-Guidelines sentence for unreasonableness are inconsistent with *United States* v. *Booker*, 543 U.S. 220 (2005). On June 11, 2007, this Court granted certiorari in *Gall* v. *United States*, No. 06-7949, to address the standards to be applied in reviewing a sentence outside the Guidelines for unreasonableness under *Booker*. Accordingly, the petition for a writ of certiorari should be held pending the Court's resolution of *Gall*, and then disposed of as appropriate in light of the decision in that case.*

* The government waives any further response to the petition unless this Court requests otherwise.

Respectfully Submitted.

PAUL D. CLEMENT
Solicitor General

OCTOBER 2007